

N O. 2 1 6 1 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF
DEFENSE, WALTER T. SKALLERUP, JR.,
DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

vs.

JOSEPH J. REMENYI,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WRIGHT, WRIGHT, TOLTON & RICE
LOYD WRIGHT
458 South Spring Street
Suite 502
Los Angeles, California 90013

ANDREW J. DAVIS, JR.
Suite 927 Gateway West Building
1801 Avenue of the Stars, Century City
Los Angeles, California 90067

Attorneys for Appellee

FILED

OCT 31 1967

WM. B. LUCK CLERK

00188277

N O. 2 1 6 1 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF
DEFENSE, WALTER T. SKALLERUP, JR.,
DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

vs.

JOSEPH J. REMENYI,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WRIGHT, WRIGHT, TOLTON & RICE
LOYD WRIGHT
458 South Spring Street
Suite 502
Los Angeles, California 90013

ANDREW J. DAVIS, JR.
Suite 927 Gateway West Building
1801 Avenue of the Stars, Century City
Los Angeles, California 90067

Attorneys for Appellee

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
QUESTION PRESENTED	6
ARGUMENT	7
CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Coleman v. United States, 363 F. 2d 190 (9th Cir.)	10
Cromwell v. Beason, 285 U. S. 57	12
Edwards v. Celebrezze, 220 F. Supp. 79	10
Greene v. McElroy, 360 U. S. 474	11, 12
Pellerini v. Celebrezze, 226 F. Supp. 176	10
Peters v. Hobby, 349 U. S. 331 (1955)	10
Service v. Dulles, 354 U. S. 363 (1957)	10
Shaw v. Celebrezze, 245 F. Supp. 572	9
Vitarelli v. Seaton, 253 F. 2d 338, reversed, 359 U. S. 535 (1959)	7, 8, 10
Webb v. Celebrezze, 226 F. Supp. 394	10

Constitution

United States Constitution:

Fifth Amendment	12
Sixth Amendment	12

Statutes

Administrative Procedure Act	7, 8, 9
5 United States Code, §1009	1
5 United States Code, §1009(e)	7
5 United States Code, §1009(e)(A)	9

Page

5 United States Code, §1009(e)(B) 9

28 United States Code, §1291 1

28 United States Code, §§2201-2202 1

Miscellaneous

Department of Defense Directive 5220.6,
"Industrial Personnel Access Authorization
Review Regulation", July 28, 1960 2

Executive Order 10865, 25 Fed. Reg. 1583 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT S. McNAMARA, SECRETARY OF
DEFENSE, WALTER T. SKALLERUP, JR.,
DEPUTY ASSISTANT SECRETARY OF DEFENSE,

Appellants,

vs.

JOSEPH J. REMENYI,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Central District of California remanding the matter to the Central Industrial Personnel Access Authorization Review Board and directing that appellee be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force [R. 254-255]. Jurisdiction below was founded upon 5 U.S.C. 1009 and 28 U.S.C. 2201-2202 [R. 2]. Jurisdiction of this appeal is conferred by 28 U.S.C. 1291.

The Jurisdictional Statement set forth in Appellant's Opening Brief pp. 1-3 is adopted by Appellee rather than being repeated

here.

STATEMENT OF THE CASE

Appellee, an American citizen, was employed by the Rocketdyne Division of North American Aviation, Inc. at Canoga Park, California, from February 6, 1959 to December 1963 [R. 184-189]. After he was first employed, Appellee applied for clearance at the "Secret" level in February 1959. He was initially granted clearance at the "Confidential" level [T. 112]. Appellee's application for clearance was made pursuant to the Industrial Personnel Security Program established by the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960. The pertinent provisions of Executive Order 10865 and of Directive 5220.6 are set forth as Appendix I to Appellants' Opening Brief.

Appellee was questioned at length by investigators representing the United States Navy and submitted to a polygraph examination in 1960 in connection with the processing of his application for clearance. In the meantime, Appellee continued working at the Rocketdyne Division of North American, Inc. Appellee established himself in the neighborhood, purchased a home and assumed there was no problem regarding his application for clearance. In November 1963 almost five years after his employment at Rocketdyne and his application for clearance, he was notified that his then existing

clearance had been revoked. Rocketdyne Division of North American Aviation, Inc. was required to terminate his employment because of his lack of clearance [R. 184-189].

Appellee requested that the matter be heard by the Field Board of the Industrial Access Authorization Review Board at the earliest possible time. The hearing was held in February 1964 and the matter is not yet resolved. Appellee has been unable to find steady employment in the United States during the last approximate four years. He could find no steady employment at all from January 1964 until January 1966 when he obtained a job with a company in West Germany [R. 113-116]. This required him and his wife to live outside the United States in Mannheim, West Germany [R. 128].

Appellee filed his complaint in the District Court on the 28th day of July, 1965, in which he alleged the procedure accorded him was violative of due process; that Appellants were without authorization to have taken the action denying him a clearance employing the procedures used; and that the action taken by the Field Examiner and Central Board had been arbitrary and an abuse of discretion. Specific matters were alleged regarding the improper admission of evidence including improper authentication of documents and lack of confrontation with the witness testifying against him [R. 2].

After a complete hearing in the court below where the entire transcript of the administrative proceedings was in evidence, the court found substantial errors in the administrative proceedings

amounting to a denial of due process. Further, the testimony of the witness testifying against Appellee was stricken from the record because of its improper admission and use based upon the government's failure to confront Appellee with the witness both in the administrative proceedings and in the court below [R. 255]. The District Court had ordered Appellants to produce their secret witness in court [R. 147]. Appellants failed to do this despite the court order. Without such purported "evidence" there is nothing in the record to support Appellants' contention that Appellee was not trustworthy and should be denied access. The only evidence properly to be considered by the administrative body hearing the matter was favorable to Appellee.

Appellee prior to, at the time of the hearing, and to the present, had been and is a loyal American citizen. He had been successful in his employment since entering this country. His employers all recommended him as a good, trustworthy employee. There was no evidence of his taking or attempting to take any secrets despite the fact he had been employed in the defense industry for several years. Appellants must not have been too concerned about his veracity and trustworthiness since they apparently had all the same information in their files since at least 1960 when he was interviewed and examined by representatives of the Navy, which examination was in part with the aid of a polygraph. After that examination and investigation Appellants permitted Appellee's then clearance to remain in effect for approximately three years and Appellee continued at the same job at the

Rocketdyne Division for which he was applying for his secret clearance.

Based upon the improper procedures taken by Appellants and the fact that there was no negative evidence in the record the court below found that the administrative determination failed to conform to the requirements of due process, was arbitrary and an abuse of discretion. In its findings of fact it listed among other things the following:

"a. [Appellee] was not permitted to confront the witness testifying against him nor to know the witness' identity;

"b. The transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;

"c. Counsel representing [appellants] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [appellee] or [appellee's] counsel and without consent on the part of [appellee] or [appellee's] counsel;

"d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board;"

The District Court further found that on the administrative record, "the granting of access authorization to [appellee] for information classified at the 'secret' level is clearly consistent with the national interests." [R. 188].

The judgment ordered the testimony of the secret witness expunged from the administrative record [R. 254-255] and "That [appellee] be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force; . . . " [R. 255], and that the matter be remanded to the administrative body for proceedings in accordance with the judgment [R. 255].

QUESTION PRESENTED

Where the administrative record contained only evidence affirmative to appellee supporting his application did the District Court have authority and jurisdiction to remand the matter to the administrative body directing that appellee be granted access to information classified as secret.

ARGUMENT

The Introduction to Appellants' Argument in their Opening Brief deals with matters which Appellants admit are not before the court on this appeal (pp. 11-14).

Appellants then argue (pp. 14-23) that the action taken by the District Court was invalid since, they contend, it improperly infringed upon the power of the Executive Branch to make decisions regarding access to classified information. Various cases are cited in support of that proposition typical of which is the Court of Appeals decision in Vitarelli v. Seaton, 253 F.2d 338. Appellants quote from that decision in their brief at page 18 as follows:

" '[i]t is not our function to decide whether appellant was or was not untrustworthy, or a "security risk". ' (253 F.2d at 343). "

However, this quotation appears in an opinion which affirms the actions of an administrative board and, therefore, only stands for the proposition that the administrative board has jurisdiction to hear the evidence and make a determination subject to review by the courts which have jurisdiction to affirm or reverse the administrative determination. On this appeal the administrative board's power to hear the case and make a determination is not at issue. This appeal concerns the nature and extent of the District Court's power to review the administrative board proceeding under the Administrative Procedure Act [5 U.S.C. §1009(e)]. Therefore, it is more notable that on appeal to the United States Supreme Court

in Vitarelli v. Seaton ^{1/} the Court reversed the holding of the Court of Appeals, held that the administrative proceeding was invalid, and, most importantly, held that the plaintiff should be reinstated in his position as a government employee.

In the case at bar the administrative board held a full hearing and made its findings. This right which is well supported in Appellants' Opening Brief was exercised by Appellants. However, after Appellants had acted adversely to Appellee, Appellee was entitled to review by the District Court pursuant to the Administrative Procedure Act, supra. On that review the Court below, after considering the entire administrative record, found no evidence supporting the administrative decision that it would not be in the national interests to grant Appellee access authorization. The Court further found that the administrative determination was arbitrary and an abuse of discretion in that it denied Appellee access authorization to information classified at the secret level. The Court, therefore, remanded the matter to the administrative board for further proceedings conforming to the judgment which included the direction that Appellee be granted access authorization at the secret level. Therefore, Appellants were not denied their right to hear and determine this case at the administrative level.

In reviewing administrative proceedings the District Court is empowered to "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of

^{1/} 359 U.S. 535 (1959).

discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute" ^{2/} and to "compel agency action unlawfully withheld or unreasonably delayed". ^{3/} This is exactly what the Court did in this case when it ruled that Appellants' actions were arbitrary and an abuse of discretion. In making that determination the District Court reviewed all the evidence which Appellants produced against Appellee to support their position that Appellee should not have secret clearance. However, as has been pointed out, there was no evidence properly in the record to justify the administrative action under the tests set forth in the Administrative Procedure Act and, on the contrary, there was overwhelming evidence to support Appellee's position. Therefore, in invalidating Appellants' proceeding which did not conform to its own rules and remanding the case to the administrative board, the Court also directed that Appellee be given access authorization for secret material. Analogous action has been taken by courts in reviewing Social Security matters and placing applicants for benefits under coverage of the Social Security Act. In Shaw v. Celebrezze, 245 F. Supp. 572, the Court found that the determination of the Secretary of Health, Education and Welfare was not supported by substantial evidence. It remanded the case to the administrative

^{2/} 5 U. S. C. §1009(e)(B).

^{3/} 5 U. S. C. §1009(e)(A).

board with directions that the applicant be placed under the Social Security Act. Similar directives were also given in other cases. ^{4/} Also, where a government employee has been discharged in an invalid proceeding, which Appellants state is an analogous situation to the case at bar (p. 18), the Court has ordered that the administrative proceeding was invalid and that the employee be reinstated in his position. Vitarelli v. Seaton, 359 U.S. 535 (1959); Cf. Service v. Dulles, 354 U.S. 363 (1957); and Peters v. Hobby, 349 U.S. 331 (1955).

More recently, in the case of Coleman v. United States, 363 F.2d 190 decided by this Court, the determination by the Secretary of the Interior was found to be arbitrary, capricious, and an abuse of discretion. The Court of Appeals remanded the entire proceeding to the Department with instructions. By analogy, the court does have jurisdiction under the holding of the Coleman case to remand in the present matter, with instructions to grant Appellee's application for secret clearance.

Government counsel raise unique problems in their brief, protesting that the doctrine of separation of powers prevents the Judicial Department from remedying a bureaucratic proceeding that is capricious, arbitrary, and an abuse of discretion. In the instant case there is no valid evidence to indicate that Appellee was or is a security risk or had ever done anything to endanger the security of

^{4/} Pellerini v. Celebrezze, 226 F. Supp. 176;
Webb v. Celebrezze, 226 F. Supp. 394;
Edwards v. Celebrezze, 220 F. Supp. 79.

the United States. The acts complained of were acts that were allegedly committed by Appellee approximately twenty years ago. The evidence given by the secret witness was expunged from the record (which the Appellants accept and do not raise on appeal). The government's complaints regarding Appellee, therefore, stand unsupported by any evidence that the appellee is untrustworthy. The government had many years to obtain valid and proper evidence to prove the charges it made in this case if there was in fact any substance to those charges.

The Court will observe in the exhibits, letters of recommendation from every company that Appellee worked for, all of which companies being either prime or subcontractors for war material, had their own security organizations, and all of whom are as anxious to preserve the national security as is the Defense Department.

In the case of Greene v. McElroy, in which the Supreme Court granted certiorari, reported in 360 U.S. 474, the Court held that the procedures of the Department of Defense relating to the Industrial Program must afford persons affected with the safeguards of confrontation and cross-examination. We submit that the record in this case indicates duress exerted by counsel for the Defense Department to compel Appellee to proceed under such circumstances as to warrant the conclusion that confrontation and cross-examination were completely denied Appellee. (See the brief by Loyd Wright attached as Exhibit "D" to the Complaint, the contents of which have not been substantially challenged by competent evidence.)

While the court in the Greene case, supra disclaimed passing upon the Constitutionality of the procedures, as the concurring opinion of Justice Harlan indicates, the court deals with the very issue it disclaims deciding, to-wit, that confrontation and cross-examination are essential to a fair hearing, and that otherwise, without these two cornerstones of protection given every citizen, the rights of Appellee have been infringed and due process denied. In the prevailing Opinion in the Greene case, it cannot be disputed but that the court considers due process to encompass the rights of the applicant under the Fifth and Sixth Amendments, and a full reading of the record in this case will sustain the conclusion of the District Court that due process was not complied with. It will also sustain the proposition that Appellee's liberty and property have been taken from him in contravention of the Fifth Amendment.

We submit a more serious question, and that is, can either the Chief Executive or the Congress take away the vested rights of an American citizen guaranteed in the Constitution and the Bill of Rights? Chief Justice Hughes raises the question [Cromwell v. Beason, 285 U.S. 57, 616] as to whether the Congress may substitute the Constitutional courts in which the judicial power of the United States is vested, with an administrative agency * * * for the final determination of the facts upon which the enforcement of the Constitutional rights of the citizen depend. This great jurist took the position that to do so would be to change the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system,

wherever Constitutional rights depend.

If under our form of government by law, the courts are denied the jurisdiction to remedy bureaucratic avariciousness and arbitrary decisions such as is apparent from the record here, then we no longer are a nation under the rule of law, but we are relegated to the unhappy plight of rule by men. Where, as here, there is no substantial evidence whatever to support the ridiculous charges of a faceless accuser, then the courts, are compelled to intervene and protect the Constitutional rights of its citizens.

CONCLUSION

We submit that after the District Court had heard all of the evidence and reviewed all of the procedural steps, that its findings and judgment should be upheld. To hold otherwise is to make a mockery of justice since this citizen has been denied his guaranteed rights for so many years by the indifferent and arbitrary action of the Defense Department. We respectfully submit that this Court remand to the Central Industrial Personnel Access Authorization Review Board, with instructions to follow the judgment of the District Court.

Respectfully submitted,

WRIGHT, WRIGHT, TOLTON & RICE
LOYD WRIGHT

and

ANDREW J. DAVIS, JR.

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Andrew J. Davis, Jr.
ANDREW J. DAVIS, JR.

